Supreme Court No. 201,645-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE DISCIPLINARY PROCEEDING AGAINST

WILLIAM H. WAECHTER,

Lawyer (Bar No. 20602).

ANSWERING BRIEF OF THE OFFICE OF DISCIPLINARY COUNSEL OF THE WASHINGTON STATE BAR ASSOCIATION

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I. COUNTERSTATEMENT OF THE ISSUES

1. The presumptive sanction for converting client funds is disbarment. The hearing officer found that Respondent William Waechter knowingly, intentionally, and repeatedly converted client funds to his own use. He also forged a client's signature on one check to facilitate negotiation of the check and conversion of that client's funds. Based on those findings, the hearing officer and unanimous Disciplinary Board recommended that Waechter be disbarred. Should the Court affirm?

2. The respondent lawyer has the burden of proving mitigating factors. Waechter failed to present any credible evidence to support the mitigating factor of personal and emotional problems. Did the hearing officer and unanimous Disciplinary Board err in declining to apply that mitigating factor?

3. A lawyer must prove an "extraordinary" mitigating factor in order to avoid disbarment for converting client funds. Is Waechter's claimed "compassion fatigue," which was not shown to have caused the misconduct, an "extraordinary" mitigating factor sufficient to mitigate the presumptive sanction of disbarment?

4. The Court has held that Rule 2.5(a) of the Rules of Appellate Procedure (RAP) does not allow a lawyer to raise an issue for the first time on appeal on grounds of "manifest error affecting a

constitutional right" when the claimed right applies only to criminal defendants. Although constitutional protections against being placed in double jeopardy apply only to criminal defendants, Waechter asserts double jeopardy concerns for the first time on appeal. Should the Court reject Waechter's attempt?

II. COUNTERSTATEMENT OF THE CASE

A. SUBSTANTIVE FACTS

Waechter was admitted to the practice of law in Washington in 1991. Bar File (BF) 63, Finding of Fact (FF) ¶ 1.[1] He is a sole practitioner in Seattle practicing personal injury law. Transcript (TR) 102.

Waechter maintained a lawyer trust account and a general operating account at Commerce Bank, and a personal account at Union Bank. FF ¶¶ 2, 3; TR 47-48, 371; EX A10, A11, A12. The Office of Disciplinary Counsel (ODC) opened an investigation after receiving a trust account overdraft notice and audited Waechter's accounts for the period of January 1, 2012 through August 6, 2013. TR 43-44.

[1] BF 63 is the hearing officer's Findings of Fact, Conclusions of Law and Recommendation. It and the hearing officer's Order Granting ODC's Motion to Modify (BF 71) are attached as Appendix A. The findings of fact and conclusions of law are divided by counts, numbered sequentially, and clearly delineated as either findings or conclusions. Paragraphs will be cited by type and number (e.g., FF ¶ 1; Conclusion of Law (CL) ¶ 19).

1. Count 1: Waechter converted client funds from trust on six occasions

ODC's audit revealed, among other things, that on at least six occasions Waechter removed client funds from trust when he was not entitled to them. Waechter used these withdrawals to cover shortages or impending overdrafts in his business operating accounts.

On January 1, 2012, Waechter's trust account had a balance of $5,243.40. Neither ODC's auditor nor Waechter's bookkeeper Karmen Agnew identified to whom $392.96 of those funds belonged, TR 79, 331-32, but there is no evidence that the $392.96 belonged to Waechter. The rest of the funds in the trust account were client funds. EX A3 at 1.

On January 25, 2012, Waechter transferred $100 from his trust account to his operating account. At the time he made this transfer, he knew his operating account had a negative balance of $97.22. EX A4 at 3-4; TR 108-09. The transfer brought the operating account balance to $2.78. EX A4 at 4. While Waechter recorded most of the transactions in his trust account in the account's check register, he did not record this one. EX A2 at 4. He made no effort to determine if he was entitled to take the $100 from trust. TR 448.

On March 13, 2012, Waechter transferred $1,500 from his trust account to his operating account. EX A5 at 1, 4. At the time of this

transfer, Waechter had $109.99 in his operating account and had an outstanding check of $1,000 that he had written to pay an expert fee for client Anderson. Id. at 5-6; TR 114-15. The outstanding check cleared his operating account on March 27, 2012. EX A5 at 4. Had he not made the $1,500 transfer, his operating account would have become overdrawn, which he knew. TR 113-14. He did not record the $1,500 transfer in his trust account check register. EX A2 at 5. At the time of this transfer, and when he wrote the $1,000 check for client Anderson, there were no Anderson funds in trust. TR 115. But funds of client DR were in the trust account because Waechter had held back a portion of a settlement received for DR in order to pay a lien for medical costs held by the Department of Labor & Industries (L&I). TR 448. In attempt to justify taking the $1,500 from trust, Waechter claimed he thought that L&I would reduce its lien on DR's funds and he would then own the leftover funds. Id. at 448, 450-51. At the time he made the $1,500 transfer, however, L&I had not reduced the lien and did not do so for more than seven months. EX A53; TR 480-81. Waechter admitted that under the law, once L&I reduced its lien, the leftover funds would belong to the client, not him, though he denied knowing that at the time he made the $1,500 transfer. TR 452. The hearing officer, however, rejected his claim that he did not know the law at the time. FF ¶¶ 13-15.

On May 4, 2012, Waechter transferred $200 from his trust account to his operating account. EX A6 at 1, 4. At the time he made this transfer, his operating account had a negative balance of $182.76. Id. at 5. After the transfer, the balance in his operating account was $17.24. Id. He did not record this transfer in his trust account check register. EX A2 at 5. He said he expected that L&I would reduce its lien on funds he received for client Rowland and he would own these funds. TR 453.

On July 27, 2012, Waechter wrote a $3,000 check to himself from his trust account and deposited it in his Union Bank personal account. EX A7. On August 10, 2012, Waechter wrote a $5,000 check to himself from his trust account and deposited it in his Union Bank personal account. EX A8. While he recorded these checks in his trust account check register, he did not record the amount of the checks or attribute them to any client matter. EX A2 at 7. Had he not transferred these funds from trust to his personal account, his personal account would have had a shortage ranging from negative $15.90 to negative $7,244.97. TR 71-72; EX A15 at 6. Waechter did not check to see if he was entitled to remove these funds from trust. TR 120, 122-23. He admitted that at the time he made these two transfers he had very little confidence in his accounting records, did not want to look at them, and "just don't know what I was doing on those two withdrawals." TR 458.

On March 12, 2013, Waechter wrote a check for $500 to himself from his trust account and deposited it into his operating account. EX A9 at 1, 5. This cured an overdraft of $122.32 in his operating account, which he knew of. EX A9 at 6; TR 123. He noted the check in his trust account check register, but did not attribute it to any client matter. EX A2 at 8. Waechter had no claim of ownership to these funds. TR 460.

Waechter took the funds from trust on these six occasions because his legal practice was not making money and he was short of funds. FF ¶ 17. He calculated the amounts needed to cover shortages in his operating and personal accounts and then withdrew the amounts needed from trust. FF ¶ 18; TR 113-16.

2. Counts 2-8: Waechter converted and mishandled funds of specific clients

a) Karen Huster's Funds

Waechter represented Karen Huster in a personal injury matter. FF ¶ 50. His fee agreement provided for a one third contingency fee. FF ¶ 51. In February 2012, Huster's case settled for $55,000, which Waechter deposited in trust. FF ¶ 52; EX A13 at 2. He agreed to take his contingency fee on only $50,000 of the settlement, which would be $16,666.50. FF ¶ 53. He prepared a settlement statement that stated his fees would be $16,665.00, he would be reimbursed $506.25 for advanced costs, $500 would be held back for outstanding costs, and he would pay

$1,602.87 to Regence Blue Shield (Regence), which held a subrogation claim. FF ¶ 54; EX A42. In February 2012, Waechter disbursed fees and costs from trust to himself and paid Huster her share, but did not pay Regence. FF ¶ 55; EX A13 at 2.

On June 6, 2012, Regence agreed to reduce its subrogation claim to $1,067.25 to make its pro rata contribution to attorney fees. FF ¶ 56; EX A44. Waechter paid Regence $1,067.25 and kept the $535.62 difference for himself. FF ¶¶ 57-58; EX A2 at 7, A13 at 5, A45, A46. He did not issue a revised settlement statement to Huster or otherwise inform her that Regence had reduced its claim and that he had kept the $535.62. FF ¶ 61. The hearing officer rejected Waechter's claim that he believed that he was entitled to take insurance company contributions to attorney fees and instead found that he knew or should have known that he was not entitled to the $535.62. Id. ¶ 59.

Waechter used the funds for his own benefit. Id. ¶ 60. On May 2, 2016, two weeks before the disciplinary hearing and nearly four years after he took the funds, Waechter issued a check to Huster in the amount of $535.62. Id. ¶ 63.

b) DR's Funds

Waechter represented DR in a personal injury matter. FF ¶ 65. His fee agreement provided for a one third contingency fee. Id. ¶ 66. In

February 2012, DR's case settled for $55,000, which Waechter deposited in his trust account. Id. ¶ 67; EX A13 at 2. Waechter prepared a settlement statement stating that his fees would be $18,331.50. FF ¶ 68. The settlement statement said $8,249.35 would be paid to L&I to cover its subrogation lien. Id. ¶ 69.

L&I agreed to reduce its lien to $4,496.39. Id. ¶ 70. Waechter paid that amount to L&I on October 19, 2012. Id. ¶ 71. But he used other clients' funds to do it. By the time he made the payment, the balance in his trust account had dropped to $71.97, and there were sufficient funds in the account to cover the L&I check only because Waechter had deposited $9,750 in proceeds for clients Weisel and PS in trust on October 12, 2012. EX A13 at 6.

Waechter did not pay DR the difference of $3,752.96 between what he held back to pay L&I and what he did pay until August 2013, 10 months after he took the funds. Id. at 10. In fact, he could not have paid DR the $3,752.96 in October 2012 because, after paying L&I, the balance in his trust account dropped to $2,825.58. TR 89; EX A13 at 6. Waechter knew or should have known that he was not handling DR's funds properly. FF ¶ 76.

c) Tori Weisel's Funds

Waechter represented Tori Weisel in a personal injury matter. Id. ¶

20. His fee agreement provided for a one third contingency fee. Id. ¶ 21. Waechter settled Weisel's case on October 12, 2012 for $7,250 and deposited the funds in his trust account. FF ¶¶ 22-23; EX A13 at 6. On October 29, 2012, Waechter emailed Weisel and told her that State Farm and Premera, which both had subrogated claims, had agreed to reduce their claims to $1,500 and $1,000 respectively, and that he intended to negotiate for further reductions. EX A25.

On November 2, 2012, Waechter paid himself a $2,000 fee in the Weisel matter and deposited these funds in his Union Bank personal account. FF ¶ 24; EX A26, A27. He admitted he intended to pay himself a fee when he wrote the check. TR 464-65. He did not list the check in his trust account check register. EX A2 at 8. After Waechter paid himself the $2,000 fee, the balance in his trust account dropped to $825.58, when it should have been at least $5,250, representing the balance of Weisel's settlement funds. EX A13 at 7. As noted above, however, part of Weisel's funds went to pay DR's L&I lien. Id. at 6.

Waechter did not give Weisel notice of his intent to take a fee and did not give her a written accounting to reflect payment to himself of the $2,000 fee. FF ¶ 25-26. Instead, on December 12, 2012, he emailed Weisel and falsely told her that "I have no intention of taking a fee on this matter." EX A29; FF ¶¶ 27-29. He sent her another email the next day,

reiterating that he would take no fee in the matter and only pay himself costs, "but costs are very low." EX A30.

On January 17, 2013, Waechter emailed Weisel an accounting of the costs and fees in her case. EX A31. The accounting falsely said that Waechter's attorney's fees would be $0 even though he already had paid himself $2,000, said he would pay a total of $1,500 to State Farm and $1,000 to Premera, his costs would be $101.42, and Weisel would receive $4,648.58. Id.; TR 464-65.

Waechter disbursed $4,648.58 to Weisel on March 25, 2013. EX A33. However, he did not have $4,648.58 in Weisel funds in his trust account at that time because he had used part of those funds to pay DR. EX A13 at 6. The trust account had enough money in it to cover Weisel's check only because Waechter had deposited an $11,000 settlement he received for client CR on March 12, 2013. Id. at 8; FF ¶¶ 39-40.

On August 6, 2013, Waechter disbursed $601.42 to himself from trust for repayment of costs in the Weisel matter, which was $500 more than what he told Weisel the costs were. EX A31, A34. Waechter did not pay State Farm or Premera and did not retain in trust the $2,500 he told Weisel he was withholding to pay them; he'd already paid it to himself for fees and costs. EX A26, A34. Waechter finally paid State Farm in October 2014 after it contacted him about its unpaid claim. FF ¶ 46; EX A36. He

never paid Premera.

On May 2, 2016, two weeks before the disciplinary hearing, Waechter's bookkeeper Agnew contacted Premera on her own and learned that Premera had written off its claim. TR 347-49, 373. Waechter then sent Weisel a check for $1,000. FF ¶ 48; EX 177.

d) TJ's Funds

Waechter represented TJ in a personal injury matter. FF ¶ 89. TJ's case settled and Waechter deposited $40,000 into trust on January 2, 2013. Id. ¶ 90; EX A13 at 7. On February 13, 2013, Waechter disbursed a total of $38,238.21 to TJ, himself, and others on TJ's behalf. FF ¶ 91; EX A13 at 7. After that, Waechter should have had $1,761.79 of TJ's funds left in his trust account. FF ¶ 92. But by April 30, 2013, the balance in Waechter's trust account dropped to $483.24. EX A12 at 53, A13 at 8. Waechter ultimately paid $1,761.79 to TJ from his Union Bank personal account on May 2, 2013. FF ¶ 95; EX A72; TR 170. He then reimbursed himself from the trust account on August 6, 2013, even though there were no funds belonging to TJ in trust at the time. EX A13 at 10, A70; TR 171.

e) CR's Funds

Waechter represented CR in a personal injury matter. FF ¶ 77. His fee agreement said that he would receive a one third contingency fee. Id. ¶ 78. On March 12, 2013, Waechter deposited $11,000 in settlement funds

received for CR into trust. Id. ¶ 79; EX A13 at 8. Waechter agreed to reduce his fee from $3,666.30 to $2,000 and paid that amount to himself on March 13, 2013. FF ¶ 80; TR 164-65; EX A13 at 8. On March 14, 2013, Waechter paid costs totaling $203.86 for CR. FF ¶ 82; EX A13 at 8.

After making these disbursements, Waechter should have had $8,796.14 of CR's funds in his trust account. EX A60. But he did not. On March 25, 2013, the date he paid Weisel her settlement proceeds of $4,648.58, the balance in his trust account dropped to $6,234.93, meaning he used a portion of CR's funds to pay Weisel. EX A13 at 8; TR 85-86.[2]

On April 8, 2013, Waechter wrote CR a check for $8,751.79 to pay CR his proceeds of the settlement, EX A13 at 8, even though the balance in his trust account that day was only $6,234.93. Id. Consequently, when CR presented the check for payment, it caused a trust account overdraft. TR 91. The bank contacted Waechter about CR's check and he deposited $3,000 in the account. Id. at 166-67. CR's check was paid, leaving a trust account balance of $483.22. EX A13 at 8.

f) Ongoing Shortages of Client Funds

As shown above, Waechter frequently failed to keep client funds in trust and in several instances used one client's funds to pay another. When

[2] Prior to depositing CR's $11,000 on March 12, 2013, the balance in Waechter's trust account was $2,587.37, less than the amount owed to Weisel.

ODC's auditor reconstructed Waechter's trust account, she determined he had an ongoing shortage of client funds in trust from July 2012 to August 2013 that rose as high as $10,300. EX A14; TR 79-82.

3. Counts 12-15: Waechter forged Shrosbree's signature on a settlement check and took the funds

Waechter represented his nephew John Shrosbree in a personal injury lawsuit after Shrosbree was injured in a car accident. FF ¶ 110. Waechter's sister, Colleen Waechter, is Shrosbree's mother. Id. ¶ 111. There was no fee agreement between Waechter and Shrosbree. Id. ¶ 112; TR 173, 268. In January 2008, Shrosbree's case settled for $90,000. FF ¶ 113; EX A86. The funds came from defendant's insurance company, Encompass. EX A86. After the matter settled, Waechter, Shrosbree, and Shrosbree's parents agreed that Waechter would be paid a fee of $20,000, which he took in full. FF ¶¶ 114-15; TR 175, 200-201.

Four years later, on May 9, 2012, Encompass notified Waechter that it was making an additional payment on Shrosbree's claim because of the decision in Matsyuk v. State Farm, 173 Wn.2d 643, 272 P.3d 802

(2012).[3] FF ¶ 116; EX A97; TR 249-50. A few days later, Waechter received a check made payable to himself and Shrosbree for $17,698.32. FF ¶ 117. Waechter claimed he did not understand why Encompass made this additional payment, but did not inquire into why the funds were paid or do any research into or discuss with any colleagues whether there was a factual or legal basis for him to keep the money. Id. ¶ 130; TR 207-08, 488, 490-91.

Waechter did not tell Shrosbree about the Encompass funds. FF ¶ 128. Instead, he told his sister about them. Id. ¶ 118. She testified she told Waechter to keep them because, while Shrosbree was married and had a child at the time, he was struggling with drug addiction. Id. ¶¶ 118-20. But Colleen had no authority to make financial decisions on Shrosbree's behalf. Id. ¶ 123. Shrosbree was not a minor, not incompetent, and not the subject of a guardianship. TR 178. Although Colleen claimed Shrosbree signed a power of attorney (POA) in 2006 that gave her authority over his financial affairs, TR 286, the only purported POA produced at hearing was unsigned and by its terms would have expired on June 1, 2008. EX A95 at

[3] Matsyuk held that in situations where the same insurer pays both Personal Injury Protection (PIP) and Bodily Injury Liability Coverage (BI) to the same plaintiff, and the plaintiff incurred lawyer fees in recovering from the insurer, the insurer must pay a pro rata share of the lawyer's fees. 173 Wn.2d at 647. Under Matsyuk, when a lawyer has already taken a full contingent fee from a settlement, any subsequent insurance company contribution to the fees belongs to the client. Id.; TR 361, 452.

3. Shrosbree testified that he did not recall signing a POA and affirmed that no one else had control of his financial affairs in 2012. TR 266, 275.

Waechter forged Shrosbree's endorsement on the back of the Encompass check without Shrosbree's knowledge or permission. FF ¶ 134. He did so by copying Shrosbree's signature from another document in an attempt to make it look like Shrosbree signed the check. Id. ¶¶ 132-33; TR 176, 178; compare Shrosbree signature on EX A86 with forged signature on EX A90. On May 25, 2012, Waechter deposited the check with the forged Shrosbree signature into his trust account, thereby putting off the forged signature as genuine. FF ¶ 131; EX A13 at 4.

Between May 25 and June 6, 2012, Waechter removed the Encompass funds from trust without Shrosbree's knowledge or permission and used them for his own purposes. FF ¶¶ 137-38; TR 178. Waechter was not entitled to take the Encompass funds as an additional fee because he already had been paid $20,000 for his work on Shrosbree's case. FF ¶ 139. Waechter did not provide a written accounting to Shrosbree or otherwise inform him of the disbursal of these funds. Id. ¶ 147.

Waechter took the funds because he needed the money. TR 202, 488. Recall that on May 4, 2012, 21 days before depositing the Encompass check, Waechter improperly transferred $200 from his trust account to correct a negative balance of $182.76 in his operating account. EX A6 at

1, 4-5. And on July 27, 2012 and August 10, 2012, Waechter improperly wrote checks for $3,000 and $5,000, respectively, to himself from trust to cover expenditures from his Union Bank personal account. EX A7, A8. Had he not done so, the Union Bank account would have had a negative balance of $7,244.97 by August 17, 2012. TR 71-72; EX A15 at 6.

On September 19, 2014, more than two years after taking Shrosbree's funds, Waechter sent Shrosbree a check for $17,500 and a letter describing receipt of the funds from Encompass. FF ¶¶ 151-52; EX A94. At the time, Waechter knew that ODC was investigating his taking of the Encompass funds because disciplinary counsel questioned him about the subject in a deposition. FF ¶ 151. Although Waechter's letter told Shrosbree that "[a]s a matter of law, the money is yours, not mine," it misleadingly failed to disclose that the funds had arrived over two years earlier and been taken by Waechter. The letter further said the money was "part of our share of an attorney's fee that was part of a settlement of your case," even though Waechter's fee had been paid in full six years before. EX A94; FF ¶ 153. Waechter never reimbursed the entire amount he owed Shrosbree; he paid $198.32 less than what he received from Encompass. FF ¶ 156; EX A90, A94.

B. PROCEDURAL FACTS

The Formal Complaint, BF 3, charged Waechter with 15 counts of

misconduct, including conversion of client funds, commission of the crimes of theft and forgery, failure to keep client funds in trust, and other trust account record keeping violations, as follows:

> Count 1: By removing funds from his trust account unrelated to any client authorization, Respondent converted funds for his own use and violated RPC 8.4(b) (by committing the crime of theft in violation of RCW 9A.56.010 et seq.), RPC 1.15A(b) and/or RPC 8.4(c).
>
> Count 2: By converting portions of KH'S clients' settlement funds to his own use, Respondent violated RPC 1.15A(b).
>
> Count 3: By taking funds in the TW case that were due to third parties, Respondent converted the funds for his own use and violated RPC 8.4(b) (by committing the crime of theft in violation of RCW 9A.56.010 et seq.) and/or RPC 1.15A(b) and/or RPC 1.15A(f) and/or RPC 8.4(c) and/or RPC 8.4(i).
>
> Count 4: By failing to maintain clients funds in trust in the TW, DR, CR and/or TJ matters, Respondent violated RPC 1.15A(c)(l).
>
> Count 5: By disbursing funds on behalf of TW that exceeded the funds TW had on deposit, Respondent violated RPC 1.15A(h)(8).
>
> Count 6: By misrepresenting to client TW that he took no fee in her personal injury matter and/or that he paid $2,500 to State Farm and/or Premera, Respondent violated RPC 8.4(c).
>
> Count 7: By failing to provide an accurate written accounting to his clients after distributing their funds held in trust in the TW and/or KH matters, Respondent violated RPC 1.15A(e) and/or RPC 1.4 and/or RPC 1.5(c)(3).

Count 8: By failing to promptly pay clients and/or third parties funds which were due to them in the DR, KH and/or TW matters, Respondent violated RPC 1.15A(f).

Count 9: By failing to maintain a checkbook register for his trust account which included entries for all transactions and a new trust account balance after each receipt, disbursement, or transfer, Respondent violated RPC 1.15B(a)(l)(v).

Count 10: By failing to maintain individual client ledgers, Respondent violated RPC 1.15B(a)(2).

Count 11: By failing to reconcile his trust account records on a monthly basis, Respondent violated RPC 1.15A(h)(6).

Count 12: By failing to inform Mr. Shrosbree of the receipt of funds from Encompass Insurance, Respondent violated RPC 1.4(a)(1) and/or RPC 1.4(a)(3) and/or RPC 1.4(b) and/or RPC 1.15A(d).

Count 13: By converting the funds received from Encompass Insurance to his own use, Respondent violated RPC 8.4(b) (by committing the crime of theft in violation of RCW 9A.56.010-050) and/or RPC 1.15A(b) and/or RPC 8.4(c) and/or RPC 8.4(i).

Count 14: By signing Mr. Shrosbree's name on the Encompass Insurance check and/or by depositing the Encompass Insurance check into his trust account, knowing that the check contained a false signature and/or by presenting the signature on the Encompass Insurance check as true knowing it to be forged, Respondent violated RPC 8.4(b) (by committing the crime of forgery in violation of RCW 9A.60.020) and/or RPC 8.4(c) and/or 8.4(i).

Count 15: By failing to provide a written accounting to Mr. Shrosbree after distributing the funds received from Encompass Insurance, Respondent violated RPC 1.15A(e).

Before the hearing, Waechter stipulated to the violations charged

in Counts 9 through 12 and 15. BF 43 at 7. He also admitted the conduct that became FF ¶¶ 1-8 (relating to Count 1 and five disbursals from trust), 20-23, 26-27, 30-31, 38 (relating to client Weisel), 50-54, 56-58, 61, 63 (relating to client Huster), 65-72 (relating to client DR), 77-84, 86-88 (relating to client CR), 89-91, 95 (relating to client TJ), 104-06 (relating to trust account record keeping), 110-11, 113, 115, 117, 128, 131, 137, 147 and 152 (relating to client Shrosbree). Id. at 2-6.

The disciplinary hearing took place on May 16-18, 2016. On July 6, 2016, Hearing Officer Evan L. Schwab entered his decision. BF 63. He found that Waechter committed all of the charged misconduct including the crimes of theft and forgery charged in Counts 1, 3, 13, and 14. CL ¶¶ 19, 96-102, 158-61. The hearing officer found that Waechter acted knowingly and intentionally when converting client funds from trust to his own use and forging Shrosbree's name, and knew or should have known that he was mishandling client funds. FF ¶¶ 11, 16, 32, 34, 41, 59, 73, 76, 85, 94, 127, 129, 133-35, 142-44, 148. He found that Waechter's conduct injured his clients and third parties. Id. ¶¶ 36, 42, 49, 62, 64, 76, 85, 94, 149, 157.

The hearing officer applied the American Bar Association's Standards for Imposing Lawyer Sanctions (1991 ed. & Feb. 1992 Supp.) (ABA Standards), and determined that disbarment was the presumptive

sanction for Counts 1 and 12-15, and suspension the presumptive sanction for Counts 2-11. CL ¶¶ 162-74. The hearing officer found four aggravating factors (dishonest or selfish motive, a pattern of misconduct, multiple offenses, and substantial experience in the practice of law), and four mitigating factors (absence of a prior disciplinary record, cooperative attitude toward proceedings, character or reputation, and remorse). CL ¶ 175. After considering the presumptive sanction and the aggravating and mitigating factors, the hearing officer recommended that Waechter be disbarred. CL ¶ 184.

Waechter filed a motion to reconsider the sanction, BF 64, which the hearing officer denied. BF 72. ODC filed a motion to amend the hearing officer's decision to make clear that he did not apply the mitigating factors of personal or emotional problems or mental disability, BF 65, which the hearing officer granted. BF 71.

The Disciplinary Board unanimously adopted the hearing officer's decision and recommendation of disbarment. BF 88.

III. ARGUMENT

A. STANDARD OF REVIEW

Unchallenged findings of fact are verities on appeal. In re Marshall, 160 Wn.2d 317, 330, 157 P.3d 859 (2007). The issue on review is whether substantial evidence reasonably supports the hearing officer's

findings and conclusions. Id. "Substantial evidence supports a finding if the record would persuade a fair and rational person that the finding is true." In re Scannell, 169 Wn.2d 723, 737, 239 P.3d 332 (2010). The substantial evidence standard requires the Court to view the evidence and the reasonable inferences "in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority." Sunderland Family Treatment Services v. City of Pasco, 127 Wn.2d 782, 788, 903 P.2d 986 (1995).

The Court gives particular weight to the credibility determinations of the hearing officer, who had direct contact with the witnesses and is best able to make such judgments. Marshall, 160 Wn.2d at 330; In re Rodriguez, 177 Wn.2d 872, 885, 306 P.3d 893 (2013). The hearing officer is entitled to evaluate both direct and circumstantial evidence to draw reasonable inferences and to determine credibility. In re Abele, 184 Wn.2d 1, 13, 358 P.3d 371 (2015). "Even if there are several reasonable interpretations of the evidence, it is substantial if it reasonably supports the finding. And circumstantial evidence is as good as direct evidence." In re McGrath, 174 Wn.2d 813, 818, 280 P.3d 1091 (2012) (quotation omitted). It is the role of the fact finder, not the reviewing court, to draw such inferences: "An essential function of the fact finder is to discount theories which it determines unreasonable because the finder of fact is the sole and

exclusive judge of the evidence, the weight to be given thereto, and the credibility of witnesses." State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999). Parties challenging factual findings must not simply reargue their version of the facts but, instead, must argue "why the specific findings are unsupported and cite to the record to support that argument." Marshall, 160 Wn.2d at 331. The Court will not overturn findings "based simply on an alternative explanation or versions of the facts previously rejected by the hearing officer and Board." Id.; Abele, 184 Wn.2d at 13.[4]

The Court reviews conclusions of law de novo and will uphold them if they are supported by the finding of fact. Marshall, 160 Wn.2d at 331. The Court declines to address challenges that "would require [it] to unearth arguments from the record" for a respondent lawyer's benefit. In re Burtch, 162 Wn.2d 873, 896, 175 P.3d 1070 (2008).

B. THE FINDINGS OF FACT ARE VERITIES ON APPEAL BECAUSE WAECHTER FAILED TO PROVIDE ARGUMENT TO SUPPORT HIS ASSIGNMENTS OF ERROR

Waechter assigns error to 78 of the hearing officer's findings of

[4] Waechter cites In re Krogh for the proposition that "in a disciplinary proceeding, all doubts should be resolved in favor of the attorney." RB at 40 n.14; Krogh, 85 Wn.2d 462, 483, 536 P.2d 578 (1975) (citing In re Little, 40 Wn.2d 421, 430, 244 P.2d 255 (1952). This Court, however, explicitly overruled this statement in In re Guarnero, 152 Wn.2d 51, 62, 93 P.3d 166 (2004) ("We conclude that the statement in Little that '[e]very doubt should be resolved in [the respondent lawyer's] favor' can have no vitality in light of the rule assigning the WSBA 'the burden of establishing an act of misconduct by a clear preponderance of the evidence.'").

fact. Waechter's Brief (RB) at 2-5. But he fails to provide any specific argument as to why each finding is erroneous. All he does is state in a footnote that he "has assigned error to the Board's findings of fact and conclusions of law that he acted knowingly, particularly in light of his argument below that he had significant personal and emotional problems, and his office financial transgressions were the result of negligence." RB at 6 n.1. It is a respondent lawyer's burden "to make persuasive arguments regarding each contested factual finding, with specific citations to the record." In re Sanai, 177 Wn.2d 743, 770, 302 P.3d 864 (2013). Since Waechter has failed to do this, the Hearing Officer's findings of fact are verities on appeal. In re Whitney, 155 Wn.2d 451, 466-67, 120 P.3d 550 (2005) (declining to address challenges to findings that are insufficiently briefed and concluding that those findings are verities); In re Jackson, 180 Wn.2d 201, 226, 322 P.3d 795 (2014) (declining to address findings not specifically referred to and rejecting challenges not supported by citations to the record or legal authority).

In any event, as set forth below, the hearing officer's mental state findings are supported by substantial evidence. To the extent that Waechter addresses factual findings as part of his challenge to the hearing officer's conclusions on aggravating and mitigating factors, we respond specifically below. We note that, in many instances, Waechter simply

reiterates on appeal testimony and arguments that the hearing officer rejected, which is insufficient to overturn a hearing officer's findings. Marshall, 160 Wn.2d at 331.

C. THE HEARING OFFICER'S FINDINGS THAT WAECHTER ACTED KNOWINGLY AND INTENTIONALLY SHOULD BE UPHELD BECAUSE THEY ARE SUPPORTED BY SUBSTANTIAL EVIDENCE

The hearing officer found that Waechter knew or should have known he was mishandling client funds, and that he acted knowingly and intentionally in converting client funds and forging Shrosbree's signature. FF ¶¶ 11, 16, 32, 34, 41, 59, 73, 76, 85, 94, 127, 129, 133-35, 142-44, 148; CL ¶¶ 162-74. Waechter challenges these mental state findings, claiming, as he did at hearing, that his actions were negligent. RB at 6 n.1. But these findings are supported by substantial evidence and are entitled to great weight on review. Abele, 184 Wn.2d at 14, 22; In re Jones, 182 Wn.2d 17, 41-42, 338 P.2d 842 (2014).

1. Substantial evidence supports the Hearing Officer's finding that Waechter acted knowingly and intentionally when committing the misconduct charged in Count 1

As to Count 1, which charged that Waechter took client funds from trust without authorization on six different occasions, the evidence showed that he had financial problems during the audit period. EX A4 at 3-4, 5-6; A6 at 5, A9 at 6, A15 at 6; TR 71-72, 114-15. He knew that he had insufficient funds in his Commerce Bank operating and Union Bank

personal accounts to cover his expenses when he took the funds from trust and calculated the amounts he needed. TR 109-09, 113-16. As to three of the transactions, for $100, $3,000, and $5,000, he made no effort to determine if he had any entitlement to the funds, yet took them anyway for his own purposes. TR 120, 122-23, 448, 458. When asked about the last three of the six transfers, for $5,000, $3,000 and $500 each, and why he may have thought he was entitled to those funds, he testified:

> This is the hardest question in this proceeding. I don't know. I don't know. I can tell you that I had very little confidence in our – in what our books said. I had very little capability to go through and resurrect.
>
> And so all I can tell you is, I believe I just didn't want to look. I made myself believe that it – certainly there is something and sufficient money to cover, but I have no – I have no link. I just – I have asked myself that question a thousand times, and I just, I can't – I was just removed, and I just don't know what I was doing on those two withdrawals.

TR 458. Under these circumstances, the hearing officer was entitled to infer that Waechter acted knowingly and intentionally. "A willfully blind respondent who 'is aware of the highly probable existence of a material fact but does not satisfy himself that it does not in fact exist,' is as culpable as the respondent who knowingly misappropriates." Matter of Irizarry, 141 N.J. 189, 194, 661 A.2d 275 (1995) (citation omitted); United States v. Benjamin, 328 F.2d 854, 862 (2d Cir. 1964) (burden of proving willfulness met "by proving that a defendant deliberately closed his eyes

to facts he had a duty to see.").

As to two of the other transfers, for $1,500 and $200, Waechter claimed he thought that L&I would reduce its lien on funds of client DR that he had held in trust to cover the lien, but he knew that L&I had not done so at the time he took the funds. TR 448, 450-53, 480-81; EX A53.

Finally, while Waechter recorded most trust transactions in his trust account check register, he either did not record these transactions at all or recorded the checks without the amount or without client attribution, which shows consciousness of wrongdoing. EX A2 at 4-5, 7, 8.

Substantial evidence supports the findings that Waechter acted knowingly and intentionally when committing the misconduct charged in Count 1.

2. Substantial evidence supports the Hearing Officer's finding that Waechter acted knowingly and intentionally when committing the misconduct charged in Counts 2-8

As to Counts 2-8, which charged that Waechter converted and mishandled funds of specific clients, the evidence showed that he repeatedly failed to keep client funds in trust and used one client's funds to pay another. In essence, he played a shell game with his clients' money.

Specifically, Waechter deposited $55,000 in settlement funds received on behalf of DR into trust in February 2012. EX A13 at 2. He disbursed funds to himself and to DR, and withheld $8,249.39 to pay a

L&I lien. But the balance in his trust account dropped to $71.97 on October 1, 2012. EX A13 at 6. L&I agreed to reduce its lien to $4,496.39, but Waechter did not pay that amount to L&I until October 19, 2012, after he deposited $7,250 in settlement funds he received for client Weisel into the trust account. EX A13 at 6. After he paid DR's L&I claim, he only had $2,825.58 left in trust, so he could not then pay DR the $3,752.96 difference between what he withheld and what he paid L&I. EX A13 at 6. He did not pay that to DR until August 6, 2013. EX A13 at 10.

As to Weisel's funds, Waechter used part of them to pay DR's L&I lien. EX A13 at 6. He paid himself a $2,000 fee in Weisel's matter on November 2, 2012, but after doing so only had $825.58 in trust when he should have had at least $5,250 in Weisel funds alone. EX A13 at 7, A26-27; TR 464-65. He falsely told Weisel that "I have no intention of taking a fee on this matter." EX A29. He also told Weisel he was withholding $2,500 to pay liens held by State Farm and Premera, but could not and did not pay those liens because he did not hold those funds in trust. Instead, he took the funds for himself. EX A26, A27, A31, A34. He paid State Farm in October 2014 and never paid Premera, which ultimately wrote off its claim. EX A36, TR 347-49. While Waechter paid Weisel her $4,648.58 share of her settlement, he did not do so until March 25, 2013, after he deposited into trust $11,000 on behalf of client CR. EX A13 at 8, A33.

Prior to the CR deposit, the balance in his trust account was only $2,587.37. EX A13 at 8.

As to CR's funds, after disbursing funds to himself for fees and costs, he should have had $8,796.14 of CR's funds remaining in trust. EX A60. But he did not. The balance in his trust account dropped to $6,234.93 after he paid Weisel her $4,648.58, EX A13 at 8, meaning that part of CR's funds were used to pay Weisel. On April 8, 2013, Waechter wrote CR a $8,796.14 check for the balance of CR's settlement after fees and costs. EX A13 at 8. But Waechter's trust account balance that day was only $6,234.93, which caused the check to bounce. EX A13 at 8; TR 91.

And there's more. Waechter deposited $40,000 into trust on behalf of client TJ on January 2, 2013. EX A13 at 7. On February 13, 2013, he disbursed a total of $38,238.21 to TJ, himself, and others on TJ's behalf. FF ¶ 91; EX A13 at 7. After that, he should have had $1,761.79 of TJ's funds left in his trust account, but by April 30, 2013, the balance in his trust account dropped to $483.24. EX A12 at 53, A13 at 8. Waechter ultimately paid TJ $1,761.79 from his Union Bank personal account on May 2, 2013. EX A72; TR 170.

Finally, as to client Huster, Waechter took the insurance company's pro rata contribution to Huster's attorney fees, also known as

the Mahler fee,[5] but did not tell Huster. FF ¶¶ 56-58; EX A2 at 7, A46, A13 at 5, A45. Waechter's bookkeeper testified that she understood "forever" that Mahler fees belonged to the client. TR 324-26, 362. Waechter testified that he did not understand this at the time, but the hearing officer rejected this claim, which he was entitled to do. See In re Ferguson, 170 Wn.2d 916, 928-29, 246 P.3d 1236 (2011).

ODC's reconstruction of Waechter's trust account showed he had an ongoing shortage of client funds in trust from July 2012 to August 2013 that rose as high as $10,300. EX A14; TR 79-82. Yet he did not bounce a trust account check until April 8, 2013, EX A13 at 8, from which the Hearing Officer reasonably could infer that he knew how much he had in trust and what he owed clients at particular times. The hearing officer was not required to accept Waechter's claim that this course of conduct resulted from mere "bad accounting" or negligence. Ferguson, 170 Wn.2d at 928-29. The hearing officer properly inferred that Waechter acted knowingly and intentionally when committing the misconduct charged in Counts 2 through 8.

[5] Referencing Mahler v. Szucs, 135 Wn.2d 398, 957 P.2d 632 (1998), which held that insurers had to pay insureds their share of legal expenses if they wished to obtain recovery for their personal injury protection (PIP) payments.

3. Substantial evidence supports the Hearing Officer's finding that Waechter acted knowingly and intentionally when committing the misconduct charged in Counts 12-15

As to Counts 12 through 15, which charged that Waechter failed to notify his nephew John Shrosbree of the receipt of funds from an insurance company, Waechter forged Shrosbree's signature on the insurance company's check so that he could negotiate it, and then stole the funds, the hearing officer found that Waechter acted knowingly and intentionally based on the following evidence:

Four years after Shrosbree's matter settled and Waechter took a $20,000 fee, Encompass sent Waechter a check for $17,698.32 made out to both Shrosbree and him, which represented an additional payment on Shrosbree's claim under Matsyuk, 173 Wn.2d at 643; FF ¶ 117 (unchallenged); EX A86, A89, A97; TR 175, 200-201, 249-50, 265. Although Waechter claimed he did not understand why Encompass sent these funds, he did no research into why the funds were paid or whether there was a factual or legal basis for him to keep the funds. TR 205, 207-08, 488, 490-91; FF ¶ 130 (unchallenged).

Waechter admitted he was motivated to take the funds for himself: he was "strapped for money" when the funds came in, and "we were trying to get that little firm going, and all of a sudden there's a check for 17 grand." TR 202, 488.

Waechter did not tell Shrosbree about his receipt of the Encompass funds. FF ¶¶ 128, 147 (unchallenged). Waechter did tell Shrosbree's mother, Colleen, about the funds. FF ¶ 118 (unchallenged). But he admitted that he did not ask Colleen if she had any legal authority to make decisions about Shrosbree's finances or authorize him to take the Encompass funds. And, in fact, she had no such authority. TR 178, 210, 257, 266, 275, 299, 491-92; EX A95 at 3.

Waechter copied Shrosbree's signature from another document in attempt to make the forged endorsement look like Shrosbree's real signature. TR 176, 178; compare EX A86 (Shrosbree signature) with EX A90 (forged signature). He did so with intent to put the forged signature off as genuine. FF ¶ 134 (unchallenged).

Waechter deposited the Encompass check in his trust account, knowing that Shrosbree had not signed it, then removed the Encompass funds from his trust account and used them for his own purposes. EX A13 at 4-5; TR 178, 207-08; FF ¶¶ 131 (unchallenged), 137-38 (unchallenged). Based on this evidence, the hearing officer reasonably could infer that Waechter acted knowingly and intentionally when committing the misconduct charged in Counts 12 through 15.

D. THE COURT SHOULD ADOPT THE DISCIPLINARY BOARD'S UNANIMOUS RECOMMENDATION OF DISBARMENT BECAUSE IT IS THE APPROPRIATE SANCTION FOR A LAWYER WHO KNOWINGLY AND INTENTIONALLY CONVERTS CLIENT FUNDS

This Court requires that the ABA Standards be applied in all lawyer discipline cases. In re Halverson, 140 Wn.2d 475, 492, 998 P.2d 833 (2000). Application of the ABA Standards is a two-stage process. First, the Court determines the presumptive sanction by considering (1) the ethical duty violated, (2) the lawyer's mental state, and (3) the extent of the actual or potential harm caused by the misconduct. In re Dann, 136 Wn.2d 67, 77, 960 P.2d 416 (1998). Second, the Court considers any aggravating or mitigating factors that might alter the presumptive sanction. Id. Finally, the Court reviews the degree of unanimity among Board members and the proportionality of the sanction. In re Kuvara, 149 W.2d 237, 259, 66 P.3d 1057 (2003).

1. The presumptive sanction here is disbarment.

The hearing officer applied ABA Standard 4.1 to Counts 1-5, 8-11, and 13-14, ABA Standard 4.6 to Counts 6, 7, 12, and 15, and ABA Standard 5.1 to Counts 1, 13, and 14. Waechter does not challenge or even address the applicability of these Standards.

The hearing officer found that Waechter knew or should have known he was mishandling client funds and that he acted knowingly and intentionally in converting client funds and forging Shrosbree's signature.

CL ¶¶ 162-74. As discussed above, Waechter challenges the hearing officer's mental state findings, but there is ample evidence to support them and they are given great weight on review. Jones, 182 Wn.2d at 41-42.

As to injury, the hearing officer found that Waechter's conduct injured his clients and third parties, who were deprived of the use of their funds, at risk of losing them altogether, and were deceived by a lawyer whom they should have been able to trust. FF ¶¶ 36, 42, 49, 62, 64, 74, 76, 85, 94, 149, 157. CL ¶¶ 162-71, 174. And the hearing officer found that Shrosbree was seriously injured. CL ¶¶ 171, 174. The hearing officer also found injury to the disciplinary system in that ODC was required to expend time and resources reconstructing Waechter's accounts. CL ¶ 170.

Waechter argues that his clients were not injured at all because they were paid in full or paid even more than they would have been had Waechter promptly and properly handled their funds rather than converting their funds to his own use. RB at 13, 15, 17-18, 20-21, 42-43. This argument fails.

> Even if an attorney reimburses the client for misappropriated funds, the repayment does not eviscerate his or her ethical violation. Indeed, we have ordered disbarment of attorneys who have repaid part or all of misappropriated funds.

In re Schwimmer, 153 Wn.2d 752, 761, 108 P.3d 761 (2005). Here, the repayments were delayed by months or years. Further, although the checks

Waechter wrote to his clients may have cleared his trust account, it is only because he received new funds on behalf of other clients, which he used to pay the prior claims. EX A13, A14; FF ¶¶ 40, 95 (unchallenged). Had he not received new funds, the clients would not have been paid. And, as to client CR, whose check bounced because his funds had not been retained in trust, CR would not have received his funds if Waechter had not had adequate funds of his own to deposit. EX A13 at 8; TR 91, 166-67.

Waechter argues that Shrosbree was not injured because he was addicted to drugs, so giving him the Encompass funds would have harmed him. RB at 24-25. But Waechter's alleged concern does not justify his taking the funds for himself and ignores the fact that arrangements could have been made for proper use of the funds. For example, the lawyer for Shrosbree's co-plaintiff, who also had drug problems, testified that he disclosed receipt of the new Encompass funds to the client and made arrangements for their protection and proper use. TR 426-29.

Based on the hearing officer's mental state and injury findings, which are supported by the record and should not be disturbed, the hearing officer and unanimous Disciplinary Board correctly determined that the presumptive sanctions are disbarment under ABA Standards 4.11, 5.11(a) and 4.61 for Counts 1 and 12-15, and suspension for the other counts under ABA Standards 4.12 and 4.62. CL ¶¶ 162-74.

2. No "extraordinary" mitigation exists in this case

The Court "will only depart from the presumptive sanction where the balance of aggravating and mitigating factors is sufficiently compelling. Importantly, [e]ven where there are several mitigating factors . . . the attorney's misconduct may still warrant the presumptive sanction." Rodriguez, 177 Wn.2d at 888 (quotations and citations omitted). The weight given to a mitigating factor depends on the totality of the circumstances. Id. at 889. The lawyer bears the burden of establishing a mitigating factor. In re Carpenter, 160 Wn.2d 16, 30, 155 P.3d 937 (2007).

In cases like this one, where a lawyer misappropriates client funds, "only 'extraordinary' mitigation will suffice to reduce the sanction from disbarment." In re Fossedal, __Wn.2d __, 399 P.3d 1169, 1175 (2017). This is because misappropriation of client funds represents such a fundamental breach of a lawyer's obligations that the most severe sanction is necessary to preserve public confidence in the profession. See In re Deschane, 84 Wn.2d 514, 516-517, 527 P.2d 683 (1974).

The hearing officer found four mitigating factors under ABA Standard 9.32: absence of a prior disciplinary record, cooperative attitude toward proceedings, character or reputation, and remorse. Standards 9.32(a), (e), (g), (*l*). CL ¶ 175. Waechter argues that the hearing officer erred in not applying the mitigating factor of personal or emotional

problems, based on his claim that he suffered from "compassion fatigue," and by requiring medical evidence to prove it. RB at 11, 32-33. As set forth below, the hearing officer properly rejected this mitigating factor. Moreover, even if the mitigating factor were considered, it is not "extraordinary."

a) The hearing officer properly rejected the personal and emotional problems mitigating factor because it was not supported by any credible evidence

First, the record does not support the application of personal or emotional problems as a mitigating factor, and the hearing officer specifically found that it did not apply. CL ¶¶ 176, 181. The hearing officer did find that the evidence clearly showed that Waechter took money in order to cure shortages in his other accounts. See EX A1, A4-9, A13-15. Based on that and the other evidence, the hearing officer determined that to the extent that Waechter had personal or emotional problems, they were caused by adverse professional events such as losing litigated cases, the resulting financial setbacks, and Waechter's need for funds following these setbacks, none of which mitigated his conduct. CL ¶ 181. The hearing officer is entitled to draw inferences such as these from the evidence. Abele, 184 Wn.2d at 13. Further, a lawyer's personal financial problems do not mitigate the sanction for theft of client funds. In re Johnson, 114 Wn.2d 737, 748, 790 P.2d 1227 (1990).

Second, the mitigating factor of personal or emotional problems requires "a connection between the asserted problem and the misconduct." In re Holcomb, 162 Wn.2d 563, 591, 173 P.3d 898 (2007). Waechter argues that his emotional problems, particularly his feelings of despair and failure, were significant components of his misconduct. RB at 34-35, 37. But he has not shown any connection between his feelings of despair and failure and his forgery and conversion of client funds, other than that the two were contemporaneous. Waechter's expert, Dr. Miranda, testified that she could only "guess" as to Waechter's state of mind when he committed the charged misconduct. TR 532. In fact, Waechter admitted to her that, notwithstanding his claimed emotional problems, he knew "you can't do what I did." EX 175 at 4. Based on this evidence, or lack thereof, the hearing officer properly rejected this mitigating factor.

Third, although Waechter claims that the hearing officer and Disciplinary Board erroneously required him to submit medical evidence to prove this mitigating factor, RB at 35, no one required him to do so. He chose to do so by presenting testimony of Dr. Miranda in attempt to prove this mitigating factor and his state of mind when committing the misconduct. He cannot now complain that the hearing officer weighed and rejected that evidence. The hearing officer was not required to give any weight to the testimony of Dr. Miranda and did not because he found it

was not credible. Burtch, 162 Wn.2d at 891; CL ¶ 177. This determination was reasonable, as Dr. Miranda could not testify to the effect of Waechter's mental state on his misconduct to any reasonable medical probability, she could only "guess." TR 531-32.

Fourth, even if the Court decides to apply the personal and emotional mitigating factor, it should be given little weight as there was no evidence that Waechter's problems caused him to convert client funds and forge his nephew's signature. In re Poole, 164 Wn.2d 710, 734, 193 P.3d 1064 (2008) (personal or emotional problems given little weight where lawyer's problems impacted but did not cause the misconduct). Further, personal or emotional problems are deemed insignificant where a lawyer has committed criminal misconduct. In re Christopher, 153 Wn.2d 669, 684, 105 P.3d 976 (2005).

b) "Compassion fatigue" is not an extraordinary mitigating factor

For the above reasons, Waechter's claimed mitigating factor of "compassion fatigue," even if applied, is not "extraordinary" enough to justify varying from the presumptive sanction of disbarment. Fossedal, 399 P.3d at 1175. The only theft case where the Court has found extraordinary mitigation since adopting the ABA Standards is In re McLendon, 120 Wn.2d 761, 771-773, 845 P.2d 1006 (1993), where it

reduced the sanction from disbarment to a two-year suspension because the lawyer suffered from untreated bipolar disorder, an organic brain disease, that impaired his ability to know what he was doing, his symptoms had abated after diagnosis and treatment, and he had a favorable prognosis. This case is distinguishable. Waechter does not suffer from an organic brain disease, he knew what he was doing was wrong, and there was no evidence that he underwent proper treatment that abated any issues. FFCL ¶ 179; EX 175, 176; see generally Fossedal, 399 P.3d at 1177-78.

3. The hearing officer correctly applied the aggravating factor of multiple offenses because Waechter violated multiple RPC and double jeopardy does not apply

The hearing officer found four aggravating factors under ABA Standard 9.22: dishonest or selfish motive, pattern of misconduct, multiple offenses, and substantial experience in the practice of law. Standards 9.22(b), (c), (d), (h). CL ¶ 175. Waechter challenges the aggravating factor of multiple offenses, claiming that his constitutional right against being placed in double jeopardy was violated by ODC's "overzealous" charging decisions that punish him multiple times for the same offense. RB at 37-38, 41-45. But ODC's charging was not "overzealous." The purpose of lawyer discipline is to protect the public and preserve confidence in the legal system. Fossedal, 399 P.3d at 1179. ODC's charging decisions here

serve that purpose. They reflect the full nature and extent of Waechter's misconduct and show the public and legal professionals that a lawyer who violates the ethical rules as Waechter did is subject to discipline for that misconduct.

In any event, Waechter failed to raise this issue below so he cannot raise it now. Recognizing that impediment to review, he argues that he can raise this issue for the first time on appeal under RAP 2.5(a) because it is a manifest error affecting a constitutional right. RB at 38-39. Not so.

a) There was no manifest error affecting Waechter's constitutional rights because the double jeopardy clause does not apply in disciplinary proceedings

Any alleged violation of a respondent lawyer's double jeopardy rights in a lawyer discipline proceeding cannot be considered a "manifest error affecting a constitutional right" because double jeopardy protections do not apply in lawyer discipline matters. See Sanai, 177 Wn.2d at 762-63 (denial of Sixth Amendment confrontation clause rights at a discipline proceeding does not constitute manifest constitutional error because bar discipline proceedings are not criminal trials).

A double jeopardy clause error can be raised for the first time on appeal in a criminal case under the manifest error rule because the double jeopardy clause is a constitutional protection that clearly applies in that,

and only that, context.[6] Hudson v. United States, 522 U.S. 93, 98 (1997) ("[t]he [double jeopardy] Clause protects only against the imposition of multiple criminal punishments for the same offense") (emphasis in original); Brown v. State, Dep't of Health, Dental Disciplinary Bd., 94 Wn. App. 7, 18, 972 P.2d 101 (1998), review denied, 138 Wn.2d 1010 (1999) (double jeopardy did not prevent revoking a dentist's license after he was convicted of a felony crime even though the revocation was based on the same conduct).

Disciplinary proceedings are not criminal, they are *sui generis* proceedings to determine whether a lawyer's conduct should have an impact on the lawyer's license to practice law. Rule 10.14(a) of the Rules for Enforcement of Lawyer Conduct (ELC); In re Conteh, 175 Wn.2d 134, 152, 284 P.3d 724 (2012). Due process requirements may differ in these special proceedings because they are not criminal. In re Allper, 94 Wn.2d 456, 467, 617 P.2d 982 (1980).

While this Court has not expressly addressed the issue of whether

[6] The federal constitution provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . ; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V (emphasis added). The state constitution provides: "No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense." WASH. CONST. art. I, § 9 (emphasis added).

double jeopardy protections apply in disciplinary cases, other courts have rejected the notion. See, e.g., The Mississippi Bar v. Coleman, 849 So. 2d 867, 874 (Miss. 2002); Matter of Caranchini, 160 F.3d 420, 423 (8th Cir. 1998); People v. Marmon, 903 P.2d 651, 655 (Colo. 1995). As the Colorado Supreme Court observed,

> In determining the proper disposition, therefore, our analysis begins and ends with the disciplinary sanction necessary to protect the public, and thus is not punishment for double jeopardy purposes. A contrary conclusion would lead to the absurd result that lawyers convicted of criminal offenses could never be disciplined.

Id.

Waechter urges this Court to apply a "unit of prosecution" analysis, RB at 39-40, but cites no authority supporting doing so in the lawyer discipline context. This is likely because he has found none. "Naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion." In re Schafer, 149 Wn.2d 148, 168, 66 P.3d 1036 (2003) (internal quotations omitted). Any alleged violation of Waechter's right against being placed in double jeopardy is not a manifest constitutional error that he can raise for the first time on appeal.

b) Even if the aggravating factor of multuple offenses were not applied, the proper sanction still would be disbarment

Even if the Court did not apply the aggravating factor of multiple offenses, the result would be the same. Waechter intentionally converted

client funds on multiple occasions and, in one instance, forged a client's signature to do so. He does not challenge the presumptive sanction of disbarment. There is no extraordinary mitigation. Waechter's belated double jeopardy claim does not change the outcome.

4. The Board's unanimous vote for disbarment is entitled to deference

The Board voted 10-0 for disbarment. BF 88 at 1 n.1. There is no "clear reason" for departure. In re Oh, 176 Wn.2d 245, 252, 290 P.3d 963 (2012).

5. Waechter has failed to meet his burden of proving that disbarment is disproportionate

Waechter argues that disbarment is disproportionate based on citation to several cases. RB at 45-47. In proportionality review, the Court compares the case at hand with "similarly situated cases in which the same sanction was approved or disapproved." In re VanDerbeek, 153 Wn.2d 64, 97, 101 P.3d 88 (2004). In determining whether a case is similar to the case at hand, the Court focuses on "the misconduct found, the presence of aggravating factors, the existence of prior discipline, and the lawyer's culpability." Conteh, 175 Wn.2d at 152-53. The Court also considers the underlying facts, the presumptive sanction, and mitigating factors. Rodriguez, 177 Wn.2d at 890-94. The lawyer bears the burden of proving that the recommended sanction is disproportionate. In re Cramer (Cramer

II), 168 Wn.2d 220, 240, 225 P.3d 881 (2010).

Here, the cases Waechter cites, RB at 45-47, are not "similarly situated" and are inappropriate for proportionality review. The hearing officer concluded that Waechter engaged in criminal activity, including theft of client funds, and found five separate violations for which disbarment is the presumptive sanction. But none of the lawyers in the cases Waechter cites were found to have engaged in criminal conduct, and in all but one of the cases, the presumptive sanctions were suspension or less. In re McKean, 148 Wn.2d 849, 869-72, 64 P.3d 1226 (2003) (presumptive sanctions were suspension and reprimand); Oh, 176 Wn.2d at 257-58 (presumptive sanction was suspension); In re Blanchard, 158 Wn.2d 317, 332, 144 P.3d 286 (2006) (presumptive sanction was suspension); In re Trejo, 163 Wn.2d 701, 724, 726-27, 185 P.3d 1160 (2008) (presumptive sanction of suspension); In re Cramer (Cramer I), 165 Wn.2d 323, 339-40, 198 P.3d 485 (2008) (presumptive sanction was suspension or reprimand). In the only case that Waechter cites where the presumptive sanction was disbarment, In re Tasker, 141 Wn.2d 557, 569-70, 9 P.3d 822 (2000), there was substantial prosecutorial delay, the lawyer had compellingly rehabilitated himself in the interim, and the Disciplinary Board was not unanimous, none of which is present here.

Cases that are appropriate for proportionality review are

Schwimmer, 153 Wn.2d 752, McLendon, 120 Wn.2d 761, and Fossedal, 399 P.3d 1169. In these cases, the lawyers were found to have criminally misappropriated client funds, the presumptive sanction was disbarment, and the lawyers claimed to have been affected by mental disability or personal and emotional problems. McLendon is the only lawyer who was not disbarred, and that was because he suffered from the "extraordinary mitigating circumstance" of bipolar disorder for which he was being successfully treated, factors which are not present here. McLendon, 120 Wn.2d at 773. In both Schwimmer and Fossedal, the lawyers' substance abuse issues were found to be insufficiently extraordinary to reduce the sanction below disbarment. Schwimmer, 153 Wn.2d at 762-63; Fossedal, 399 P.3d at 1177-78. Waechter's alleged personal and emotional problem of "compassion fatigue" is also insufficiently extraordinary to avoid disbarment, even if that mitigating factor were applied. Waechter failed to meet his burden of proving that disbarment is a disproportionate sanction.

IV. CONCLUSION

Waechter made professional decisions that caused him to experience financial problems. Even though he knew it was wrong to do so, he misappropriated client funds from trust in order to solve his problems. When he received unexpected funds paid to his nephew, he treated those funds like a windfall, concealed his receipt of the funds from

his nephew, forged his nephew's signature on the check in order to negotiate it, and misappropriated those funds as well. The Disciplinary Board unanimously recommended disbarment, which, under these facts, is a proportionate sanction that serves to protect the public and preserve confidence in the legal system. Fossedal, 399 P.3d at 1179. The Court should adopt the Board's recommendation and disbar Waechter.

RESPECTFULLY SUBMITTED this 2nd day of October, 2017.

OFFICE OF DISCIPLINARY COUNSEL

M Craig Bray, Bar No. 20821
Disciplinary Counsel

APPENDIX A

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re **WILLIAM H. WAECHTER,** Lawyer (Bar No. 20602).	Proceeding No. 14#00076 FINDINGS OF FACT, CONCLUSIONS OF LAW AND HEARING OFFICER'S RECOMMENDATION

The undersigned Hearing Officer held the hearing on May 16, 2016 through May 18, 2016 under Rule 10.13 of the Rules for Enforcement of Lawyer Conduct (ELC). Respondent William H. Waechter appeared at the hearing with his lawyer, Samuel B. Franklin. Disciplinary Counsel Francesca D'Angelo appeared for the Office of Disciplinary Counsel (ODC) of the Washington State Bar Association.

FORMAL COMPLAINT

The Formal Complaint charged Respondent with the following counts of misconduct:

- Count 1 - By removing funds from his trust account unrelated to any client authorization, Respondent converted funds for his own use and violated RPC 8.4(b) (by committing the crime of theft in violation of RCW 9A.56.010 et seq.), RPC 1.15A(b) and/or RPC 8.4(c).

- Count 2 - By converting portions of KH'S clients' settlement funds to his own use,

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003

Respondent violated RPC 1.15A(b).

- Count 3 - By taking funds in the TW case that were due to third parties, Respondent converted the funds for his own use and violated RPC 8.4(b) (by committing the crime of theft in violation of RCW 9A.56.010 et seq.) and/or RPC 1.15A(b) and/or RPC 1.15A(f) and/or RPC 8.4(c) and/or RPC 8.4(i).

- Count 4 - By failing to maintain clients funds in trust in the TW, DR, CR and/or TJ matters, Respondent violated RPC 1.15A(c)(1).

- Count 5 - By disbursing funds on behalf of TW that exceeded the funds TW had on deposit matter, Respondent violated RPC 1.15A(h)(8).

- Count 6 - By misrepresenting to client TW that he took no fee in her personal injury matter and/or that he paid $2,500 to State Farm and/or Premera, Respondent violated RPC 8.4(c).

- Count 7 - By failing to provide an accurate written accounting to his clients after distributing their funds held in trust in the TW and/or KH matters, Respondent violated RPC 1.15A(e) and/or RPC 1.4 and/or RPC 1.5(c)(3).

- Count 8- By failing to promptly pay clients and/or third parties funds which were due to them in the DR, KH and/or TW matters, Respondent violated RPC 1.15A(f).

- Count 9 - By failing to maintain a checkbook register for his trust account which included entries for all transactions and a new trust account balance after each receipt, disbursement, or transfer, Respondent violated RPC 1.15B(a)(1)(v).

- Count 10 - By failing to maintain individual client ledgers, Respondent violated RPC 1.15B(a)(2).

- Count 11- By failing to reconcile his trust account records on a monthly basis, Respondent violated RPC 1.15A(h)(6).

- Count 12- By failing to inform Mr. Shrosbree of the receipt of funds from Encompass Insurance, Respondent violated RPC 1.4(a)(1) and/or RPC 1.4(a)(3) and/or RPC 1.4(b) and/or RPC 1.15A(d).

- Count 13 - By converting the funds received from Encompass Insurance to his own use, Respondent violated RPC 8.4(b) (by committing the crime of theft in violation of RCW 9A.56.010-050) and/or RPC 1.15A(b) and/or RPC 8.4(c) and/or RPC 8.4(i).

- Count 14 - By signing Mr. Shrosbree's name on the Encompass Insurance check and/or by depositing the Encompass Insurance check into his trust account, knowing that the check contained a false signature and/or by presenting the signature on the Encompass Insurance check as true knowing it to be forged, Respondent violated

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RPC 8.4(b) [by committing the crime of forgery in violation of RCW 9A.60.020] and/or RPC 8.4(c) and/or 8.4(i).

- Count 15 - By failing to provide a written accounting to Mr. Shrosbree after distributing the funds received from Encompass Insurance, Respondent violated RPC 1.15A(e).

Based on the pleadings in the case, the testimony, exhibits, and the pre-hearing stipulation entered into by the parties on May 13, 2016, the Hearing Officer makes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent was admitted to the practice of law in 1991.

A. Count 1

Findings of Fact

2. Respondent maintained a trust account with Commerce Bank ending in 0307.

3. On January 25, 2012, Respondent transferred $100 from his trust account ending in 0307 to his operating account ending in 0293.

4. On March 13, 2012, Respondent transferred $1,500 from his trust account ending in 0307 to his operating account ending in 0293.

5. On May 4, 2012, Respondent transferred $200 from his trust account ending in 0307 to his operating account ending 0293.

6. On July 27, 2012, Respondent wrote a $3,000 check to himself from his trust account.

7. On August 10, 2012, Respondent wrote a $5,000 check to himself from his trust account.

8. On March 12, 2013, Respondent wrote a check for $500 to himself from his trust account.

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9. These disbursements were not related to the interests of any client whose funds Respondent was holding in his trust account.

10. Respondent was not entitled the funds.

11. Respondent knew that he was not entitled to the funds when he disbursed the funds from his trust account to himself.

12. Respondent used the funds for his own benefit.

13. Respondent had no rational explanations for the withdrawals.

14. Respondent's claims that he had no conscious awareness of making the withdrawals and that the withdrawals were the result of bad accounting are not credible.

15. Respondent's claims that he thought he was entitled to the funds that he took were not credible. Respondent knew that he was not entitled to the funds.

16. Respondent converted the funds knowingly and intentionally with the intent to deprive his clients or third parties of their funds for a period of time.

17. Respondent took the funds because his operating accounts were short of money. Respondent needed the money because his legal practice was not making money.

18. Respondent calculated the amounts needed to cover shortages in his operating account and then withdrew the amounts needed from the trust account.

Conclusions of Law

19. Count 1 has been proven by a clear preponderance of the evidence. Respondent's conduct violated RPC 8.4(b) (by violating RCW 9A.56.010), RPC 1.15A(b) and RPC 8.4(c).

B. <u>Counts 2-7</u>

Findings of Fact

<u>Tori Weisel</u>

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20. Respondent represented Tori Weisel in a personal injury matter.

21. Respondent's fee agreement with Ms. Weisel provided for a contingency fee of 33% of the gross settlement.

22. On October 12, 2012, Respondent settled Ms. Wiesel's case for $7,250.

23. Respondent deposited the funds into his trust account.

24. On November 2, 2012, Respondent took a fee of $2,000 from the trust account for Ms. Weisel's case.

25. Respondent did not give notice to Ms. Weisel of his intent to take the fee through a billing statement or other document.

26. Respondent did not provide Ms. Weisel with a written accounting to reflect the $2,000 disbursal.

27. On December 12, 2012, Respondent wrote Ms. Weisel and told her that he was in the process of negotiating with the subrogation interest holders, State Farm and Premera Blue Cross (Premera).

28. In the same correspondence, Respondent stated that he would waive his fee in her case. Respondent knew that this statement was untrue.

29. Respondent had already disbursed $2,000 to himself as attorney's fees, but did not inform Ms. Weisel of this fact.

30. On January 17, 2013, Respondent sent Ms. Weisel an email with an accounting of the costs and fees in the case.

31. The accounting stated that Respondent's fees would be -0-, that he would pay a total of $2,500 to State Farm and Premera and that costs would be $101.42.

32. Respondent knew that the accounting was false and misleading since he had

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already taken $2,000 as his fee and that Ms. Weisel did not have sufficient funds remaining in his trust account to pay State Farm or Premera.

33. Respondent disbursed the $2,000 of the funds that he represented would be paid to State Farm and Premera to himself for his own benefit when he took that sum as a fee.

34. Respondent converted the funds owed to State Farm and Premera intentionally, with the intent to deprive State Farm and/or Premera of their funds for some period of time.

35. Respondent did not provide Ms. Weisel an updated settlement statement or otherwise account to Ms. Weisel for the $2,500 that should have been paid to State Farm and Premera.

36. Ms. Weisel was injured in that she was deceived as to the amount of fees taken by Respondent, was not given an opportunity to object to the handling of her settlement funds, and was deceived as to the amount of funds she was entitled to receive.

37. Respondent did not make payment to State Farm until October 2014 and did not make a payment to Premera.

38. On March 25, 2013, Respondent issued Ms. Weisel a check for $4,648.58.

39. On March 25, 2013, Respondent's trust account did not have sufficient funds remaining from Ms. Weisel's settlement to cover the check because Respondent had disbursed her funds on behalf of other clients and to himself.

40. Respondent used other clients' funds to cover the March 25, 2013 check issued to Ms. Weisel.

41. Respondent knew that Ms. Weisel's funds were no longer in trust and that he was using other client funds to cover her payment.

42. There was injury to the clients whose funds were used to pay Ms. Weisel and to

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Ms. Weisel whose funds had been depleted by other disbursements.

43. On August 6, 2013, Respondent disbursed $601.42 to himself as costs related to Ms. Weisel's matter.

44. Respondent was not entitled to $500 of the amount disbursed to himself as costs related to Ms. Weisel's matter. According to Respondent's settlement statement, the $500 should have been paid to State Farm and/or Premera.

45. Respondent used the funds for his own benefit.

46. In October 2014, Respondent paid $1,500 to State Farm when they contacted him about their unpaid claim.

47. At some point thereafter, Respondent learned that Premera had waived their $1,000 subrogation.

48. On May 2, 2016, two weeks before his disciplinary hearing, Respondent issued a check to Ms. Weisel for $1,000.

49. State Farm was injured in that its payment was delayed. Ms. Weisel was injured in that she did not receive the funds that were due her until May 2016.

Karen Huster

50. Respondent represented Karen Huster in a personal injury matter.

51. Respondent's fee agreement with Ms. Huster provided for a contingency fee of 33 1/3% of the gross settlement.

52. In or around February 2012, Ms. Huster's case settled for $55,000.

53. Respondent agreed to take his contingency fee on $50,000 of the settlement.

54. Respondent prepared a settlement statement that stated his fees would be $16,665.00 and that $1,602.87 would be paid to Regence Blue Shield (Regence) for

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subrogation.

55. On February 10, 2012, Respondent disbursed $16,655.00 to himself as fees.

56. On June 5, 2012, Regence agreed to reduce its subrogation to $1,067.25.

57. On June 6, 2012, Respondent issued a check to Regence in the amount of $1,067.25.

58. On or about June 6, 2012, Respondent issued a check to himself in the amount of $535.62, without Ms. Huster's knowledge or permission.

59. Respondent knew or should have known that he was not entitled to the $535.62.

60. Respondent used the funds for his own benefit.

61. Respondent did not issue an accounting to Ms. Huster or otherwise inform her of the $535.62 that he had taken.

62. Ms. Huster was actually injured in that she did not receive the funds to which she was entitled until May 2016, was deceived as to the amount of funds taken by Respondent and the amount that she was entitled to receive, and was not given an opportunity to object to the handling of her settlement funds.

63. On May 2, 2016, Respondent issued a check to Ms. Huster in the amount of $535.62.

64. Ms. Huster was injured in that she did not receive the funds to which she was entitled in a timely manner.

Client DR

65. Respondent represented DR in a personal injury matter.

66. Respondent's fee agreement with DR stated that he would receive a contingency fee of 33 1/3% of the gross recovery.

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67. In February 2012, DR's case settled for $55,000.

68. Respondent prepared a settlement statement stating that his fees would be $18,331.50.

69. The settlement statement listed $8,249.35 as the amount that would be paid for medical subrogation liens. The subrogation lien was owed to The Department of Labor and Industries (L&I).

70. In October 2012, L&I agreed to reduce its lien to $4,496.39.

71. On October 19, 2012, Respondent paid L&I's reduced lien from DR's funds in trust.

72. Respondent did not disburse the $3,752.96 difference to DR until August 6, 2013.

73. Respondent knew or should have known that he was not paying the funds owed to DR in a timely manner.

74. DR was injured in that he was not paid the funds due him in a timely manner.

75. Between October 19, 2012 and August 6, 2013, Respondent failed to maintain all of DR's funds in his trust account.

76. Respondent knew or should have known that he was not treating DR's funds properly. DR was potentially injured in that his funds were not protected.

Client CR

77. Respondent represented CR in a personal injury matter.

78. Respondent's fee agreement with CR stated that he would receive a contingency fee of 33 1/3% of the gross recovery.

79. In March 2013, CR's case settled for $11,000.

80. Respondent agreed to reduce his fee to $2,000.

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81. On March 13, 2013, Respondent disbursed a check to himself for $2,000 as attorney's fees in CR's case.

82. On March 14, 2013, Respondent paid costs in the amount of $203.86 for CR's case.

83. After making these disbursements, Respondent should have had $8,796.14 of CR's funds remaining in his trust account.

84. Respondent failed to maintain CR's funds in his trust account.

85. Respondent knew or should have known that he was not treating CR's funds properly. CR was injured in that his funds were not protected.

86. On April 8, 2013, Respondent disbursed $8,751.79 to CR by check.

87. On April 8, 2013, there were insufficient funds in Respondent's trust account to cover the check to CR and, when the check was presented, the account was overdrawn.

88. On April 8, 2013, Respondent deposited $3,000 into his trust account to cover the shortage. On April 8, 2013 the check to CR was paid.

Client TJ

89. Respondent represented TJ in a personal injury matter.

90. In or around January 2013, TJ's case settled for $40,000.

91. On or around February 13, 2013, Respondent properly disbursed a total of $38,238.21 to TJ, to himself, and to others on TJ's behalf.

92. After making these disbursements, Respondent should have had $1,761.79 of TJ's funds in his trust account.

93. Between February 13, 2013 and May 2, 2013, Respondent failed to maintain the $1,761.79 balance of TJ's funds in his trust account.

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94. Respondent knew or should have known that he was not treating TJ's funds properly. TJ was potentially injured in that her funds were not protected.

95. On May 2, 2013, Respondent disbursed $1,761.79 to TJ from his personal account.

Conclusions of Law

96. Count 2 has been proven by a clear preponderance of the evidence. By converting portions of Ms. Huster's settlement funds to his own use, Respondent violated RPC 1.15A(b).

97. Count 3 has been proven by a clear preponderance of the evidence. By converting funds in Ms. Weisel's case that were due to third parties and/or Ms. Weisel without entitlement and with the intent to deprive the third parties and/or Ms. Weisel of their funds, Respondent violated RPC 8.4(b) (by committing the crime of theft in violation of RCW 9A.56.010 et seq.), RPC 1.15A(b), RPC 1.15A(f) , RPC 8.4(c) and RPC 8.4(i).

98. Count 4 has been proven by a clear preponderance of the evidence. By failing to maintain Ms. Wiesel, DR, CR and TJ's funds in trust Respondent violated RPC 1.15A(c)(1).

99. Count 5 has been proven by a clear preponderance of the evidence. By disbursing funds on behalf of Ms. Weisel that exceeded the funds that Ms. Weisel had on deposit, Respondent violated RPC 1.15A(h)(8).

100. Count 6 has been proven by a clear preponderance of the evidence. By misrepresenting to Ms. Weisel that he took no fee in her personal injury matter and that he paid $2,500 to State Farm and/or Premera, Respondent violated RPC 8.4(c).

101. Count 7 has been proven by a clear preponderance of the evidence. By failing to provide an accurate written accounting to his clients after distributing their funds held in trust in the Weisel and Huster matters, Respondent violated RPC 1.15A(e), RPC 1.4 and RPC 1.5(c)(3).

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102. Count 8 has been proven by a clear preponderance of the evidence. By failing to promptly pay clients and State Farm funds which were due to them in the DR, Huster and Weisel matters, Respondent violated RPC 1.15A(f).

C. **Counts 9-11**

103. By his Answer to the Formal Complaint, and the pre-hearing Stipulation signed by the parties, Respondent has admitted the violations contained in Counts 9-11.

Findings of Fact

104. From January 1, 2012 through August 6, 2013, Respondent failed to maintain a check register that included all transactions for his IOLTA trust account and failed to maintain a check register for his trust account with a running balance after each transaction.

105. From January 1, 2012 through August 6, 2013, Respondent failed to maintain individual client ledgers for his client trust account.

106. From January 1, 2012 through August 6, 2013, Respondent failed to reconcile his bank statements to his trust account records.

Conclusions of Law

107. Count 9 has been proven by a clear preponderance of the evidence. By failing to maintain a check register that included all transactions for his IOLTA trust account and by failing to maintain a check register for his trust account with a running balance after each transaction, Respondent's violated RPC 1.15B(a)(1)(v).

108. Count 10 has been proven by a clear preponderance of the evidence. By failing to maintain individual client ledgers for his client trust account, Respondent violated RPC 1.15B(a)(2).

109. Count 11 has been proven by a clear preponderance of the evidence. By failing to

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reconcile his bank statements to his trust account records, Respondent violated RPC 1.15A(h)(6).

D. Counts 12-15

Findings of Fact

110. Respondent represented Mr. Shrosbree in a personal injury lawsuit.

111. Mr. Shrosbree is the son of Respondent's sister, Colleen Waechter.

112. There was no fee agreement between Respondent and Mr. Shrosbree.

113. The case settled in January 2008 for $90,000.

114. At the time of the settlement, Respondent, Mr. Shrosbree and his family agreed that Respondent's fee would be $20,000.

115. Respondent accepted a fee of $20,000 for his work on the case.

116. Four years later, by letter dated May 9, 2012, Encompass Insurance advised Respondent that they were sending him $17,698.32 as an additional payment on Mr. Shrosbree's claim.

117. A few days later, Respondent received a check payable to John Shrosbree and Respondent for $17, 698.32.

118. In May 2012, Respondent explained the situation to his sister Colleen Waechter. Ms. Waechter told Respondent to keep the money.

119. In May 2012, Mr. Shrosbree was 24 years old, married and a father.

120. Because Mr. Shrosbree was using drugs at the time, Respondent and Ms. Waechter did not discuss or even consider giving the money to Mr. Shrosbree. Ms. Waechter thought her son was addicted to drugs.

121. Respondent and Ms. Waechter did not discuss or consider any other alternatives

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such as putting the funds in trust or in a restricted bank account, petitioning for a guardianship, or giving the money to Mr. Shrosbree' s wife.

122. The only subject discussed at the time was having Respondent keep the money.

123. Ms. Waechter had no authority to authorize Respondent to keep the money.

124. Ms. Waechter testified that Mr. Shrosbree signed a power of attorney in 2006 in favor of Ms. Waechter and Mr. Shrosbree's father. Mr. Shrosbree did not recall specifically signing a power of attorney to his mother and father to handle matters for the case.

125. Only an unsigned copy of a power of attorney was produced and admitted into evidence at hearing. Because the unsigned power of attorney admitted into evidence expired on June 1, 2008 and the personal injury case commenced by Mr. Shrosbree was settled before June 1, 2008, the hearing officer does not make a determination of whether the power of attorney actually existed in 2006.

126. There was no competent evidence that Ms. Waechter had an extended power of attorney from her son in 2012, when she told Respondent to keep the money from Encompass that arrived in May 2012.

127. Respondent knew that Ms. Waechter lacked authority to give him the money and knew he should advise and consult with his client, which he did not do.

128. Respondent did not inform Mr. Shrosbree of his receipt of the Encompass funds.

129. Respondent knew that the funds belonged to Mr. Shrosbree.

130. Respondent did not research whether there was a factual or legal basis for him to keep the money. Nor did he discuss the issue with any colleagues or seek professional advice.

131. On May 25, 2012, Respondent deposited the Encompass money into his trust account.

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132. At the time of the deposit, Respondent forged Mr. Shrosbree's endorsement to the back of the Encompass check by copying Mr. Shrosbree's signature from another document.

133. Respondent forged Mr. Shrosbree's endorsement intentionally and knowingly, trying to make the endorsement look like Mr. Shrosbree's genuine signature.

134. Respondent signed Mr. Shrosbree's name without Mr. Shrosbree's knowledge or permission and with the intent to pass off Mr. Shrosbree's signature as genuine.

135. Respondent's forgery of the financial instrument was deliberate and intentional.

136. Respondent misrepresented to the financial institution, Commerce Bank of Washington, which held his trust account, about the bona fides of the deposit by presenting a check with the forged endorsement.

137. Between May 25 and June 6, 2012, Respondent removed the Encompass funds from his trust account without Mr. Shrosbree's knowledge or permission.

138. Respondent used the Encompass funds for his own purposes.

139. Respondent was not entitled to keep the Encompass money as an additional fee for Mr. Shrosbree's case as the case was settled four years earlier, and Respondent had accepted $20,000 as his fee on the case.

140. Respondent did not have a written fee agreement with Mr. Shrosbree or his parents. He certainly did not have an agreement calling for a higher fee four years later.

141. Respondent was not entitled to the Encompass funds.

142. Respondent knew that he was not entitled to the Encompass funds.

143. Respondent's actions were a knowing and intentional conversion of client funds.

144. Respondent converted the funds with the intent to deprive Mr. Shrosbree of the

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funds.

145. Respondent stole and converted the funds because he needed the money and his operating accounts were short. In 2012 respondent had experienced a bad year financially. He had lost cases involving substantial advancements for the clients, which could not be recovered.

146. Respondent did not consult with Mr. Shrosbree about receipt of the money or whether he was entitled to the additional fees. He did not tell Mr. Shrosbree he had received the extra money. This nondisclosure is guilty behavior, proving that he knew that he was secretly taking and converting the client's money.

147. Respondent did not provide a written accounting to Mr. Shrosbree or otherwise inform him of the distribution of the funds.

148. Respondent acted knowingly and with the intent to hide his own misconduct.

149. Mr. Shrosbree was injured in that he was not informed of the funds and his funds were misappropriated without his knowledge.

150. After two years and four months had passed following the conversion of the funds, Respondent finally advised Mr. Shrosbree about the Encompass funds. He did so because he learned that the Office of Disciplinary Counsel was investigating the Encompass situation and respondent realized that the true facts were about to be discovered and disclosed.

151. Respondent advised Mr. Shrosbree about the funds by letter in September 2014, after the Office of Disciplinary Counsel had questioned him about the subject in a deposition.

152. On September 19, 2014, Respondent mailed a check for $17,500 payable to Mr. Shrosbree with a letter to Mr. Shrosbree stating that the money belonged to Mr. Shrosbree and not to respondent.

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153. The letter was misleading because it said that the money arrived "some time ago" and it did not disclose that the money arrived over two years earlier and had been misappropriated by the Respondent.

154. The letter was also misleading because it said, "The money is part of our share of an attorney's fee that was part of a settlement of your case." The money was not part of Respondent's fee, which had been paid six years earlier.

155. The letter correctly stated that "As a matter of law, the money is yours, not mine."

156. In sending a check for $17,500 to Mr. Shrosbree, Respondent shortchanged his client by $198.32. Respondent has provided no explanation for his failure to deliver the $198.32 to Mr. Shrosbree.

157. Respondent's conduct caused actual injury to his client.

Conclusions of Law

158. Count 12 has been proven by a clear preponderance of the evidence. By failing to inform Mr. Shrosbree of the receipt of funds from Encompass Insurance, Respondent violated RPC 1.4(a)(1), RPC 1.4(a)(3), RPC 1.4(b), and RPC 1.15A(d).

159. Count 13 has been proven by a clear preponderance of the evidence. By converting the funds received from Encompass Insurance to his own use, Respondent violated RPC 8.4(b) by committing the crime of theft in violation of RCW 9A.56.010-050, RPC 1.15A(b), RPC 8.4(c), and RPC 8.4(i).

160. Count 14 has been proven by a clear preponderance of the evidence. By signing Mr. Shrosbree's name on the Encompass Insurance check, by depositing the Encompass Insurance check into his trust account knowing that the check contained a false signature, and

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by presenting the signature on the Encompass Insurance check as true knowing it to be forged, Respondent violated RPC 8.4(b) (by committing the crime of forgery in violation of RCW 9A.60.020, RPC 8.4(c), and RPC 8.4(i).

161. Count 15 has been proven by a clear preponderance of the evidence. By failing to provide a written accounting to Mr. Shrosbree after distributing the funds received from Encompass Insurance, Respondent violated RPC 1.15A(e).

E. Presumptive Sanction

162. Count 1: Respondent knowingly converted client property and committed the crime of theft. Respondent's conduct caused injury to the clients whose funds were in his trust account. The presumptive sanction is disbarment under ABA Standards 4.11 and 5.11.

163. Count 2: In the Huster matter, Respondent should have known that he was not entitled to keep the funds left over after Regence reduced its subrogation and that these funds belonged to Ms. Huster. There was actual injury to the client. The presumptive sanction under ABA Standard 4.12 is suspension.

164. Count 3: In the Weisel matter, Respondent knowingly converted funds and committed the crime of theft. State Farm was harmed in that its payment was delayed. Ms. Weisel was harmed in that she did not receive the funds that were due her until May 2016. The presumptive sanction under ABA Standards 4.12 is suspension.

165. Count 4: Respondent knew or should have known that he was not treating Ms. Wiesel, DR, CR and TJ's funds properly when he did not maintain their funds in his trust account. The clients were injured in that their funds were not protected. The presumptive sanction under ABA Standard 4.12 is suspension.

166. Count 5: Respondent knew or should have known that he was not treating Ms.

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Weisel's funds properly when he disbursed funds to her that exceeded the funds that she had on deposit. There was injury to the clients whose funds were used to pay Ms. Weisel. The presumptive sanction under ABA Standard 4.12 is suspension.

167. Count 6: Respondent's conduct in misrepresenting to Ms. Weisel that he took no fee in her personal matter and that he had paid $2,500 to State Farm and Premera was knowing. Ms. Weisel was injured in that she was deceived as to the amount of fees taken by Respondent and deceived as to the amount of funds that she was entitled to receive. The presumptive sanction under ABA Standard 4.62 is suspension.

168. Count 7: Respondent knew that his accountings to Ms. Huster and Ms. Weisel were inaccurate. Both clients were injured in that they were deceived as to the amount of fees taken by Mr. Waechter, were not given an opportunity to object to the handling of their settlement funds and were deceived as to the amounts they were entitled to receive. The presumptive sanction under ABA Standard 4.62 is suspension.

169. Count 8: Respondent acted knowingly in failing to pay clients and State Farm the funds that were due them. The clients and State Farm were injured in that they were deprived of the funds they were entitled to receive in a timely manner. The presumptive sanction under ABA Standard 4.12 is suspension.

170. Counts 9-11: Respondent knew that he was failing to maintain adequate trust records and failing to reconcile his trust account. There was injury to the clients whose funds were at risk and injury to the disciplinary system when ODC was required to expend time and resources in reconstructing these accounts. The presumptive sanction under ABA Standard 4.12 is suspension. The presumptive sanction for Counts 2-11 is a two-year suspension.

171. Count 12: In failing to inform Mr. Shrosbree of the receipt of funds from

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Encompass Insurance, Respondent acted knowingly and with the intent to hide his own misconduct. Mr. Shrosbree was seriously injured in that he was not informed of the funds and his funds were misappropriated without his knowledge. The presumptive sanction under ABA Standard 4.6 is disbarment.

172. Count 13: Respondent acted knowingly in converting the funds received from Encompass Insurance to his own use and with the intent to deprive Mr. Shrosbree of his funds. The presumptive sanction under ABA Standards 4.11 and 5.11(a) is disbarment.

173. Count 14: Respondent acted knowingly in signing Mr. Shrosbree's name on the Encompass Insurance check, by depositing the Encompass Insurance check into his trust account knowing that the check contained a false signature, and by presenting the signature on the Encompass Insurance check as true knowing it to be forged. The crime of forgery involves fraud and deceit. The presumptive sanction under ABA Standards 4.11 and 5.11(a) is disbarment.

174. Count 15: Respondent acted knowingly and with the intent to hide his own misconduct in failing to provide a written accounting to Mr. Shrosbree after respondent received the funds from Encompass Insurance. Mr. Shrosbree was seriously injured in that he was not informed of the receipt of the funds, which allowed the funds to be misappropriated without his knowledge. The presumptive sanction under ABA Standard 4.6 is disbarment.

F. Aggravating and Mitigating Factors

175. The following aggravating factors set forth in Section 9.22 of the ABA Standards are applicable in this case:

(b) dishonest or selfish motive: Respondent was acting with a dishonest or selfish motive when on several occasions he took money from his trust account without entitlement and endorsed the Encompass check, deposited the money in his trust account and took the funds;

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(c) a pattern of misconduct; respondent committed multiple offenses evidencing a pattern.

(d) multiple offenses;

(i) substantial experience in the practice of law: Respondent was admitted to the practice of law in 1991.

The following mitigating factors set forth in Section 9.32 of the ABA Standards are applicable to this case:

(a) absence of a prior disciplinary record;

© Personal or emotional problems

(e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;

(g) character or reputation;

(i) mental disability

(l) remorse.

176. The hearing officer has considered Respondent's argument that he was suffering from personal or emotional problems and a mental disability (depression and vicarious traumatization) at the time of these offenses. The evidence presented on these issues was incompetent and insufficient.

177. Respondent presented the testimony of Marta Miranda, Psy. D., to testify as to whether "psychological factors could explain his poor judgment with regard to his practice as an attorney." Dr. Miranda's opinion was that "although his state of mind three years ago was not directly measured data collected in this evaluation suggests that this decisions were likely impacted by vicarious traumatization." Dr. Miranda said "vicarious traumatization is "known

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as compassion fatigue in some circles." The hearing officer found Dr. Miranda's opinions speculative and not credible .

178. Dr. Miranda first examined Respondent in December 2015. Dr. Miranda's testimony suggesting that Respondent may have suffered from vicarious traumatization in 2012 is unsupported by her 2015 examination and testing of Respondent. The various tests that she administered only address and speak to Respondent's condition in late 2015. As admitted by Dr. Miranda the tests did not determine respondent's state of mind or whether he was experiencing vicarious traumatization symptoms in 2012. On cross examination Dr. Miranda testified that respondent was aware of his ethical obligations regarding trust accounts and was aware that he should not have used trust accounts for his own expenses. Dr. Miranda also admitted on cross-examination that it was not possible for her to ascertain respondent's "state of mind at the time he breached the standards of his profession." Dr. Miranda did not have credible or persuasive opinions about Respondent's vicarious traumatization at the relevant times.

179. There was no evidence that Respondent has in the past or is now undergoing counseling or any program to address the underlying causes of his misconduct.

180. Because there was no competent or sufficient evidence that Respondent was suffering from a mental disability at any relevant time, the mitigating factor of mental disability does not apply.

181. Nor does the mitigating factor of personal or emotional problems apply on the record in this case. To the extent that Respondent had personal or emotional problems, they were caused by normal adverse professional events such as losing litigated cases, the resulting financial setbacks and his need for funds following his professional reversals. None of these

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circumstances justify conversion of client funds or Respondent's other violations of the RPC. The mitigating factor of personal or emotional problems does not apply.

182. The hearing officer has considered Respondent's argument that he made a timely good faith effort to make restitution or rectify the consequences of his misconduct. Aside from payments to the client "CR", none of Respondent's restitution efforts were made before Respondent realized the Bar Association was investigating him. Restitution to Ms. Weisel and Ms. Huster was not made until two weeks prior to the start of this hearing on May 16, 2016, even though Respondent had been aware of these issues since August 2014. This mitigating factor does not apply.

183. The mitigating factors that are present do not justify a reduction of the presumptive sanction called for by the ABA Standards.

RECOMMENDATION

184. Based on the ABA Standards and the applicable aggravating and mitigating factors, the Hearing Officer recommends that Respondent William H. Waechter be disbarred.

185. Respondent should be required to pay restitution in the following amounts:

- $198.32 to Mr. Shrosbree, plus $5,549, representing interest at the rate of 12 percent per annum on the $17,500 from May 2012 through September 2014;
- $488.53 to Ms. Weisel, representing interest at the rate of 12 percent per annum from November 2012 to May 2016 on the $1,000 wrongfully taken;
- $298.28 to Ms. Huster, representing interest at the rate of 12 percent per annum from June 2012 to May 2016 on $535.62 wrongfully taken.

Dated this 5 day of July, 2016.

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Evan L. Schwab
Hearing Officer

CERTIFICATE OF SERVICE

I certify that I caused a copy of the FOF COL & HO's Recommendation to be delivered to the Office of Disciplinary Counsel and to be mailed to Sam Franklin Respondent/Respondent's Counsel at 701 Pike St #1200 Seattle WA 98101 by Certified/~~first class mail~~, postage prepaid on the 6th day of July, 2016.

Clerk/Counsel to the Disciplinary Board

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BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re

WILLIAM H. WAECHTER,

Lawyer (Bar No. 20602).

Proceeding No. 14#00076

ORDER GRANTING ~~RESPONDENT~~ ODC's MOTION TO MODIFY, AMEND OR CORRECT

This matter came before the hearing officer on ODC's motion to modify, amend or correct the hearing officer's Findings of Fact, Conclusions of Law, and Recommendations filed July 6, 2016. The hearing officer finds that good cause exists to grant the motion.

It is therefore ordered that Paragraph 175 of the Findings of Fact, Conclusions of Law and Recommendation is amended to remove the factors of personal or emotional problems and mental disability from the list of applicable mitigating factors.

Dated this 8 day of August, 2016.

Evan L. Schwab,
Hearing Officer

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CERTIFICATE OF SERVICE

I certify that I caused a copy of the order granting ODC's Motion to Modify, Amend or Correct
to be delivered to the Office of Disciplinary Counsel and to be mailed
to Sam Franklin Respondent/~~Respondent's Counsel~~
701 Pike St #1200 Seattle, WA 98101 by Certified/~~first class mail~~,
postage prepaid on the 11th day of August, 2016.

Clerk/Counsel to the Disciplinary Board

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re **WILLIAM H. WAECHTER**, Lawyer (Bar No. 20602)	Supreme Court No. 201,645-6 DECLARATION OF SERVICE BY MAIL

The undersigned Disciplinary Counsel of the Office of Disciplinary Counsel (ODC) of the Washington State Bar Association declares that he caused a copy of the ANSWERING BRIEF OF THE OFFICE OF DISCIPLINARY COUNSEL to be mailed by regular first class mail with postage prepaid on October 2, 2017 to:

Philip A. Talmadge
Talmadge/Fitzpatrick/Tribe
2775 Harbor Aenue SW
Third Floor, Suite C
Seattle, WA 98126

The document was also electronically served on October 2, 2017.

The undersigned declares under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

10/2/2017; Seattle, WA
Date and Place

M Craig Bray, Bar No. 20821
Disciplinary Counsel
1325 4th Avenue – Suite 600
Seattle, WA 98101-2539
(206) 733-5998

WASHINGTON STATE BAR ASSOCIATION

October 02, 2017 - 12:27 PM

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